INTERIOR BOARD OF INDIAN APPEALS

Estate of George Laverne Francis

54 IBIA 149 (11/10/2011)

Related Board case:
51 IBIA 260

# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

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| ESTATE OF GEORGE LAVERNE FRANCIS | ) | Order Vacating Reopening Order and Remanding |
| | ) | Docket No. IBIA 10-051 |
| | ) | November 10, 2011 |

We vacate and remand the November 24, 2009, Order Reopening Case to Modify Probate Decision (Reopening Order) entered by Administrative Law Judge Thomas F. Gordon (ALJ) in the estate of George Laverne Francis (Decedent), deceased Saginaw Chippewa (Isabella) Indian, Probate No. P000030949IP. The Reopening Order modified a September 23, 2009, probate decision (September 23 Order) to add Reba Janeen Navejar (Reba) and Nina Marie Francis (Nina) as Decedent's children and additional heirs. The Reopening Order also reduced accordingly the fractional shares of Decedent's estate inherited by his previously determined heirs, including Appellant Bobbie Jo Jackson-Valtierra, who is one of Decedent's children. In her appeal to the Board of Indian Appeals (Board), Appellant maintains that Reba and Nina are not Decedent's children, and that she was not given notice before the ALJ reopened the estate to add Reba and Nina as heirs.[1]

[1] Appellant also contends that several other individuals are not Decedent's children and are ineligible to be his heirs. With respect to these other individuals, the ALJ determined them to be Decedent's children and heirs in his September 23 Order. The scope of the present appeal is limited to reviewing the Reopening Order, the subject of which was the addition of Reba and Nina as heirs. We note, however, that in addition to appealing to the Board, Appellant also sent letters to the ALJ to reopen the estate for the purpose of challenging these other individuals as heirs. While the ALJ lacked jurisdiction to consider Appellant's reopening petition while this appeal was pending, on remand the assigned probate judge may consider as appropriate the additional issues raised by Appellant as well as the additional evidence sent to the Board by the Bureau of Indian Affairs (BIA). *See* note 7.

We agree with Appellant that the ALJ erred in reopening the estate and altering the rights of Appellant and the other previously determined heirs without giving notice to these individuals that he had new evidence before him that suggested that Reba and Nina may have been omitted as Decedent's children and heirs. In addition, it was incumbent upon the ALJ to identify the evidence before him and to provide an opportunity to respond, whether to challenge the evidence, produce other relevant evidence, or otherwise address the ALJ's notice.

**Background**

Decedent, a Saginaw Chippewa (Isabella) Indian, died intestate and a widower on June 17, 2005. At the time of his death, his trust estate consisted of $13.40 in his Individual Indian Money (IIM) account and small interests in two allotments.[2]

On September 23, 2009, the ALJ issued an Order in which he determined that Decedent had 13 children who survived him, each of whom was entitled to 1/13 of Decedent's trust estate. The ALJ relied on information shown on the Data for Heirship Finding and Family History (OHA-7 form) provided by BIA and other documents in the record.[3]

On November 5, 2009, the Superintendent of BIA's Michigan Agency sought a "correction" of the September 23 Order to add Reba and Nina as additional children and heirs of Decedent based upon unspecified information obtained at "another family probate hearing."[4] On November 24, 2009, the ALJ entered his Reopening Order in which he added Nina and Reba as Decedent's daughters and heirs based on testimony received in

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[2] Decedent owned a 5/648 interest in Allotment No. 41 and 5/432 interest in Allotment No. 107, both located on the Isabella Reservation in Michigan.

[3] The ALJ scheduled and sent notices of a hearing in Decedent's estate but no one appeared who had information concerning Decedent. Therefore, at the time the ALJ issued his September 23 Order, the information he received from BIA was uncontested.

[4] A copy of the Superintendent's memorandum, bearing a "received" date of November 10, 2009, by the ALJ's office, is attached to the notice of appeal received by the Board from Joseph P. Jackson (Joseph) in *Estate of George Laverne Francis*, 51 IBIA 260 (2010). Neither the original nor a copy is included in the record.

Joseph's appeal, which was dismissed for failure to inform the Board that he had served his appeal on interested parties, raised the same issues as Appellant's appeal.

proceedings to probate the estate of Decedent's mother-in-law, Emily Marie Kahgegab (Emily), and redistributed Decedent's estate in equal (1/15) shares to the heirs. At the hearing in Emily's estate, one of Emily's children testified that Emily's daughter and Decedent's wife, Nelxine, was the mother of Reba and Nina. There was no testimony concerning the paternity of Nina or Reba. The ALJ did not provide Appellant or Decedent's previously determined heirs any notice that he considered the additional evidence from Emily's probate hearing as sufficient to reopen Decedent's estate and thus they were not given an opportunity to respond before the ALJ issued his Reopening Order.

Appellant appealed the ALJ's decision to the Board. Appellant contends that Reba and Nina are not Decedent's children and that she was not given notice and an opportunity to respond to the evidence on which the ALJ relied.

**Discussion**

We must vacate the Reopening Order and remand this matter because the ALJ did not provide due process to Appellant and the additional interested parties before finding, based on additional evidence, that Reba and Nina were Decedent's children and heirs to his estate.

It is well established that Appellant bears the burden of showing error in the ALJ's decision. *Estate of Thomas Boe*, 47 IBIA 138, 143 (2008). And a procedural error, such as reopening an estate to materially change the terms of a probate order based on additional evidence without providing notice and an opportunity to object, is grounds for vacating a decision. *Id*. at 143-44.

When a closed estate is reopened for the purpose of, as here, adding heirs or altering the distribution of an estate to previously-determined heirs, due process demands that the previously determined heirs be given notice and an opportunity to object. The Supreme Court has held that

> [t]he essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard."

*Matthews v. Eldridge*, 424 U.S. 319, 348-49 (1976) (citations omitted). As we explained in *McCann Resources, Inc. v. Eastern Oklahoma Regional Director*, 53 IBIA 278, 284 (2011), "'[n]otice' consists not only of informing the [parties] of the nature of the proposed adverse

action . . . , but also informing the [parties] of the reasons for the proposed action, and providing the [parties] an opportunity to respond."

Here, the ALJ, apparently on his own motion, reopened Decedent's estate based upon testimony that he received in the hearing held in Emily's estate. *See* Reopening Order at 1.[5] The regulations do not specifically address the ALJ's duty to provide notice and an opportunity to respond when he reopens an estate *sua sponte* to add (or delete) heirs. *See* 43 C.F.R. §§ 30.242(a)(1), 30.243(b) (2009). But when an ALJ is presented with a petition to reopen an estate, and believes the petition has merit, the ALJ is required to provide notice to interested parties, and we conclude that due process requires no less notice when an ALJ is prepared to reopen an estate on the ALJ's own motion based on new or additional evidence to which interested parties have not had an opportunity to respond.[6] It is not sufficient simply to grant reopening *sua sponte* and afford the parties an opportunity to appeal to the Board because the Board is not the proper forum for considering and weighing, in the first instance, objections and counter evidence offered in rebuttal to that evidence on which the probate judge relied. When a probate judge reopens an estate *sua sponte* to consider new or additional evidence, the reopening should be treated no differently than a reopening based upon a petition from an individual or from BIA that appears to have merit. *See* 43 C.F.R. § 30.243(b) (2009).

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[5] The Reopening Order does not mention BIA's November 5, 2009, memorandum to the ALJ requesting that Decedent's estate be reopened to add Nina and Reba as heirs. If the Reopening Order were issued in response to BIA's request, then the regulations expressly required notice to be given. *See* 43 C.F.R. § 30.243(b) (2009); *Estate of Melissa Heminger*, 53 IBIA 241 (2011).

[6] In addition to 43 C.F.R. § 30.242(a)(1) (2009), § 30.125 also sets forth circumstances, not implicated here, in which an ALJ may reopen an estate. Section 30.125 expressly requires the ALJ to provide notice. We are not convinced that the inclusion of an express notice requirement in § 30.125, and the omission of a similar requirement in § 30.242(a)(1) warrant the conclusion that no notice was required in this case. At best, the differences among §§ 30.243(b) (2009) (requiring notice where a petition to reopen appears to have merit), 30.242(a)(1) (no provision requiring notice when judge reopens *sua sponte*), and 30.125, give rise to an ambiguity. We resolve that ambiguity by construing § 30.242(a)(1) in a manner most consistent with constitutional due process.

For the above reasons, we vacate the Reopening Order and remand this matter to the Probate Hearings Division for further proceedings consistent with this decision.[7]

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the ALJ's Order Reopening Case to Modify Probate Decision and remands this matter to the Probate Hearings Division for further proceedings consistent with our decision.

I concur:

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| // original signed | // original signed |
| Debora G. Luther | Steven K. Linscheid |
| Administrative Judge | Chief Administrative Judge |

[7] While this appeal was pending before the Board, BIA provided the Board with birth certificates for Reba and Nina, which are now part of the probate record in this matter.

BIA also provided an adoption decree for four of Decedent's children, showing that they were adopted as minors by Simon and Shirley Francis. This information was not provided to the ALJ at the time of his decisions in Decedent's estate. The adoption decree has also been added to the record and, by our decision today, is referred to the Probate Hearings Division for appropriate consideration.